California Fair Political Practices Commission

M E M O R A N D U M

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: Mark Krausse, Senior Commission Counsel
Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Transfer and Attribution (§85306) – Second Pre-notice Discussion of Proposed Regulation 18536

Date: June 6, 2001

I. Introduction and Background

This regulation is before the Commission for a second pre-notice discussion to address issues assigned to staff or otherwise left unresolved at the Commission's May meeting.

Decisions Rendered

The Commission made the following decisions regarding proposed Regulation 18536 at the May meeting: 1) The terms "last-in, first out" (LIFO) and "first in, first out" (FIFO) were defined under what was characterized as the layperson approach; 2) A committee wishing to transfer funds to a committee for an elective state office must make the election between LIFO and FIFO on a one-time basis at the time of the initial transfer; and 3) A committee performing a transfer under this authority may transfer an amount per contributor equal to the amount the committee could have received under Section 85318 (authority to collect a contribution for the general election prior to the primary election). In addition, several language changes, including the deletion of redundant references to Section 85306, have been incorporated in the attached draft Regulation 18536.[1]

Issues to be Resolved

The Commission assigned several issues to staff for further drafting. Additional issues were raised by the Franchise Tax Board and the regulated community which are addressed in other changes to the regulation. Each of these issues is discussed in the decision points below.

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[1] In response to a question raised after the Commission meeting, the language of the subdivision (a) of the proposed regulation ("any other controlled committee of the candidate") would apply to both a candidate's committee for elective office and to a ballot measure committee the candidate controls.

Decision 1—Record keeping requirements. Subsequent to the Commission's last discussion of this proposed regulation, the Enforcement Division and the Franchise Tax Board expressed concern that the draft regulation contained no basis for attribution of contributions—i.e., it required no records to show an original contribution was ever received from the contributor to whom a transferred contribution is attributed. Paragraph (2) of subdivision (b) has been added (at page 2, line 9) to address this concern by requiring that a committee maintain either detailed records or copies of verified and filed campaign reports showing the original contribution on which basis attribution to that contributor is made. **Staff recommends the Commission adopt the language in Decision 1.**

Decision 2—Whether to require disclosure of attributed contributions. At the pre-notice discussion in May, questions were raised regarding whether disclosure of the contributors to whom transferred campaign funds are attributed is necessary or even appropriate. Under existing law, a committee making a transfer must report "the amount and source of any miscellaneous receipt."[2] (See Attached Form 460, Schedule I for example.) For this reason, no regulatory language would be necessary to require a committee to disclose the lump sum amount being transferred, along with the name of the transferring committee and the date of the transfer. The Commission would need to adopt regulatory language if it decided to require disclosure of attributed contributors.

Arguments against disclosure. At the May Commission meeting, concerns were expressed that the address, occupation and employer information the transferring committee has on hand may be inaccurate given the potential lapse in time since the original contribution, and that this information may confuse the members of the public rather than inform them. The requirement that a committee maintain records of the attribution done at the time of transfer could provide a sufficient basis for enforcement. Mandatory reporting of attributed contributors, at first blush, would seem to serve the purpose of disclosure by providing voters with information on who is supporting a given candidate. But examined more closely in this context, disclosure could actually mislead contributors in those instances where former supporters of a candidate either no longer actively support the candidate, or in fact support his or her opponent, but nonetheless are reported as "attributed contributors" to the campaign.

Arguments for disclosure. Disclosure of the attributed contributors, while creating the potential for confusion, would allow the public to scrutinize transfers and monitor whether contributors to whom a transfer has been attributed subsequently make contributions in violation of Proposition 34. This information, if required by the Commission, could be disclosed on the Form 460, Schedule A, with a code such as "T" denoting that a contribution was transferred and is therefore an attributed contribution rather than a direct one. (See Attached Form 460, Schedule I for example.) Finally, in what few analogues the Commission has as guidance, attribution or its equivalent was required. Specifically, in the case of contributions made through an intermediary,

[2] Subsection (l) of Government Code Section 84211. All further references are to the Government Code unless otherwise noted.

both the original contributor(s) and the intermediary are disclosed.[3] In the case of now-repealed Regulation 18535, which had until this year governed transfers to special election committees in accordance with Proposition 73, disclosure of attributed contributors was required.

Balancing the considerations mentioned above, **staff recommends the Commission require disclosure of attributed contributors by adopting the language provided in paragraph (2) of subdivision (b) on page 2, beginning at line 13.**

Decision 3--Disclosure of address, occupation and employer. Questions also arose concerning the utility of requiring disclosure of the address, occupation and employer of contributors to whom transferred funds are attributed, particularly given the potential for inaccurate information when a transfer is performed many years after the original contribution for which the information was first collected. The regulated community has not objected to disclosing this information and, in fact, some have expressed concern that not requiring this information would cause software vendors to rewrite their software to strip it from reports. For this reason, staff has drafted language that makes disclosure of the information voluntary. Also included in this voluntary information is the committee identification number, if the transferor is a recipient committee. **Staff recommends the Commission adopt the language in Decision 3, Option b.**

Decision 4—Limiting transfers of concurrently raised funds to LIFO attribution method. **Options a and b under Decision 4** were drafted to prohibit a committee from attempting to use the FIFO method of attribution to disclose a transfer of contributions recently collected because of that method's susceptibility to manipulation. For example, a candidate could file a notice of intention to run for elective state office, collect a contribution from Contributor L into another committee, then transfer that contribution to the elective state office committee using FIFO to attribute it to Contributor A, and accept another contribution from Contributor L directly to the elective state office committee. While the Commission recognized the potential for abuse here, several commissioners also expressed concern that the choice between LIFO and FIFO was expressly provided for in Section 85306. The Commission directed staff to reconsider the issue, and to draft language creating a presumption that concurrently raised contributions be attributed to the contributors who actually made them. The Commission also directed staff to draft language that would prohibit any attribution of concurrently raised contributions that would circumvent the contribution limits of Proposition 34.

The language proposed in **Decision 4, Option c** creates a presumption that a transfer of funds that includes contributions collected by the transferring committee *after* the creation of the receiving committee (i.e., "concurrently raised") will be attributed to persons who made contributions after that date. This will ensure that contributions collected after the date a candidate has declared for an elective state office will be attributed to the contributors who

[3] Section 84302 provides, in pertinent part, "The recipient of the contribution shall include in his campaign statement the full name and street address, occupation, and the name of the employer, if any, or the principal place of business if self-employed, of both the intermediary and the contributor."

actually made them and thereby ensures that recent contributors may give to the candidate only the sums expressly authorized by Proposition 34.

The language proposed in **Decision 4, Option d** was also added at the request of the Commission. This language prohibits a transfer of funds raised after the date the receiving committee qualified as a committee (collected or spent $1,000) if the contributions received after that date would violate Proposition 34 if made directly to the receiving committee. This language resolves concerns over prohibiting a method of attribution expressly allowed by Section 85306, and uses language that states its purpose clearly: a transfer can't be employed to violate the contribution limits.

Each option is vulnerable to the argument that it contradicts the unconditioned authority provided by Section 85306: "Contributions transferred shall be attributed to specific contributors using a 'last in, first out' or 'first in, first out' accounting method." While **Option d** makes no mention of the method of attribution, it prohibits a transfer altogether where it would result in a circumvention of the contribution limits. This is equally in conflict with Section 85306, although the language of the prohibition makes the case for its necessity. **Staff provides no recommendation on these options at this time.**

Decision 4—Delayed operative date for candidates for statewide elective office. Section 83 of Proposition 34 provides as follows:

> This act shall become operative on January 1, 2001. However, Chapter 5 (commencing with Section 85100) of Title 9 of the Government Code, except subdivision (a) of Section 85309 of the Government Code, shall apply to candidates for statewide elective office beginning on and after November 6, 2002.[4]

The next statewide general election takes place on November 5, 2002. The effect of this language is to delay the application of all but one subdivision of Chapter 5 to candidates for statewide elective office until the day after the next statewide general election. Since Section 85306 falls under this delayed operative provision, proposed Regulation 18536 should be delayed in its application to these candidates as well.

At the last meeting, questions arose whether this regulation should apply to committees formed for the November 5 election that continue in existence on November 6 (as virtually all will to pay accrued expenses, fundraise for debt repayment, etc.). The Commission may

[4] Proposition 34 was Chapter 102, Statutes of 2000. Senate Bill 34, currently pending in the state Assembly, would amend this language as follows: "This act shall become operative on January 1, 2001. However, *Article 3 (commencing with Section 85300), except subdivision (a) of Section 85309, Article 4 (commencing with Section 85400), and Article 6 (commencing with Section 85600) of* Chapter 5 ~~(commencing with Section 85100)~~ of Title 9 of the Government Code ~~, except subdivision (a) of Section 85309 of the Government Code,~~ shall apply to candidates for statewide elective office beginning on and after November 6, 2002."

decide that Section 85306 should not apply to transfers to a statewide elective office committee formed for the November 5, 2002 election, even if the transfer in question was performed after that date. This is a reasonable interpretation of Section 83 that would avoid the anomalous result of rendering contributions that were allowable on November 5, 2002, violations of the Act on November 6, 2002. (This language is reflected in subdivision (e) on page 4, lines 4 through 7.)

Consider, for example, a committee formed to seek the office of Controller at the November 5, 2002 general election. On that day and on any day prior, the committee could collect contributions or transfers not subject to Proposition 34's contribution limits. Yet in the days and months after that election, in seeking to repay debt that might have been incurred, one reading of Section 83 would subject those contributions to Proposition 34's limits.

Commission authority. The language of Option b was drafted in part to anticipate issues that will inevitably arise regarding retroactive application of Chapter 5 to committees for 2002 statewide offices. Some may argue that this language departs from a plain reading of Section 83. Staff believes, however, that the language is a reasonable interpretation of that section in the context of pre- and post-election committee activity. This option is supported by the language of subdivision (c) of Section 85306 which states ". . . a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors."

General or specific approach. Subdivision (e) was drafted to address the concerns of Proposition 34's delayed effective date for statewide elective office candidates, and to resolve some of the questions related to retroactivity in the context of transfers. A different approach would be to adopt a single regulation addressing the retroactive application of Proposition 34 to elections occurring prior to its effective date. A desire for the consistency provided by a cohesive regulatory framework argues for a single regulation. This would allow the Commission to deal with both the delayed effective date for statewide candidates and retroactive application of Proposition 34 in a consistent manner. Providing language to address these issues on a regulation-by-regulation basis, however, ensures that the unique aspects of each of the initiative's many provisions are taken into account in addressing delayed application and retroactivity.

Similar issues arise in the context of Section 85316, which limits to the net debt outstanding from an election the amount an elective state office candidate may collect after the date of the election. That issue is discussed in Item 7, a pre-notice discussion of proposed Regulations 18531.6 and 18531.7 related to fundraising for debt and officeholder expenses. Since many of the decisions in that proposed regulation involve the delayed application and potential retroactive application of Section 85316, this memo defers greater discussion of these issues to that memorandum. **Decision 4, Option b conforms to Option b under Decision 8 in the staff memorandum provided under Item 7, and is staff's recommendation here. The**

Commission may wish to defer this decision to its meeting on adoption of this regulation in September.